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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1030

STATE OF MINNESOTA, by its Attorney General, WARREN SPANNAUS, and its Pollution Control Agency,

Appellants,

vs.

MARTIN R. HOFFMAN, as Secretary of the Army, et al.,

Appellees.

On Appeal From, and Petition for Certiorari to, the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE SIERRA CLUB AND THE IZAAK WALTON LEAGUE OF AMERICA, INC., IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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Statutory Authority:

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C.A. §§1251 *et. seq.* (1976) 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 15

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The Sierra Club and the Izaak Walton League of America, Inc., as *amici curiae* pursuant to Rule 42 of the rules of this Court, respectfully submit that the Appeal of the State of Minnesota in the instant appeal should be fully heard by the Court. The *amici curiae* submit that Appellants' reasons for requesting review show a need for consideration of the decision below by this honorable Court.

INTEREST OF THE *AMICI CURIAE*

The interest of the Sierra Club and the Izaak Walton League of America, Inc. in the federal agency jurisdictional question presented herein is twofold:

1. The Sierra Club, a national conservation organization, is a non-profit California corporation with its principal place of business in the City and County of San Francisco, California, and has a membership in excess of 150,000 members. The purposes of the Sierra Club are to enhance and protect by all lawful means the natural resources and human environment of the United States and the earth in general; to explore, enjoy and preserve scenic resources of the United States and its forests, water, wildlife and wilderness; to undertake and to publish scientific, literary and educational studies concerning them; to educate the people with regard to the national and state navigable rivers and streams, forests, parks, monuments and other natural resources of a special scenic beauty and to enlist public interest and cooperation in protecting them.

The Izaak Walton League of America, Inc., (hereinafter referred to as the League) is a long-established citizen organization concerned with the environment and the preservation and use of natural resources. The League sponsors and actively involves itself in programs ranging from local conservation projects to programs involving the entire spectrum of environmental interests; from wilderness and wildlife to urban matters such as water quality, air quality, solid waste and rapid transit. The upper Mississippi River has been especially important to the League with its strong membership in Iowa, Illinois, Minnesota and Wisconsin. The League has been extensively involved in

considering the impact of a 9-foot navigation channel on the upper Mississippi. It has insisted that commerce on the river not devastate wildlife resources and recreational opportunities. The League is especially interested in the impact of dredge removal and disposal on river recreational and wildlife opportunities. Problems involved with the current methods of disposal include the suspension of toxic materials in the river, the choking off of a fresh water supply in backwater areas by disposal, and increased turbidity and its possible effects on aquatic vegetation and animal life.

2. The Sierra Club and the League are, in addition, vitally interested in assuring that water pollution control standards established by the United States and the respective states be enforced so as to provide the greatest degree of protection to United States water resourcs.

The impact of dredge removal and disposal on the ecology, recreation and wildlife as supported by United States water resources is of major concern to the Sierra Club and the League. Water is a finite resource. The quality of water affects the health, welfare and quality of life of each citizen of the United States and the quality of many of its industries. Because water quality affects United States citizens and industry, Congress in 1972 enacted Amendments to the Federal Water Pollution Control Act[1] to strengthen its efforts to meet the need for water quality, declaring as a national goal that "the discharge of pollutants into the navigable waters be *eliminated* by 1985."[2] The Amend-

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[1]The Act was first passed in 1948, Act of June 30, 1948, 62 Stat. 1155, and has been frequently amended. See annotation following 33 U.S.C. §1251 (Supp. IV). Before the 1972 Amendments, the Act was codified at 33 U.S.C. §§1151 *et. seq.*

[2]§101(a)(1), 33 U.S.C.A. §1251(a)(1) (1976) (emphasis added).

ments were aimed at achieving maximum limitations on effluents discharged into navigable waters as well as achieving acceptable water quality standards.[3] A National Pollution Discharge Elimination System was established as a means of achieving and enforcing the effluent limitations.[4] Congress also desired that "every federal agency provide national leadership in the control of water pollution in [its] operations."[5]

In the instant proceedings, the State of Minnesota seeks *inter alia* to require that the United States Army Corps of Engineers abide by Minnesota's water pollution control standards promulgated pursuant to the Federal Water Pollution Control Act, as amended.[6] The Eighth Circuit Court of Appeals, in a clear misreading of both the Act and this Court's recent decisions in *Hancock v. Train*[7] and *EPA v. California*,[8] has held that the Corps of Engineers need not follow Minnesota's substantive water pollution control standards.[9] As a result, the clear mandate of the Act has been ignored and the congressional goal that the discharge of pollutants into the navigable waters of the United States be eliminated by 1985 will not be attained to the serious detriment of all citizens of the United States.

It is perhaps unusual that an overriding federal objective is to be achieved by subjecting federal agencies in certain instances to state substantive laws. But in enacting the Federal Water Pollution Control Act Amendments of

[3] §102(a), 33 U.S.C.A. §1252(a) (1976).
[4] §402, 33 U.S.C.A. §1342 (1976).
[5] Senate Report quoted in *EPA v. California*, — U.S. —, 48 L.Ed.2d 578, 585 (1976).
[6] *State of Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976).
[7] — U.S. —, 96 S. Ct. 2006, 48 L.Ed.2d 555 (1976).
[8] — U.S. —, 96 S. Ct. 2022, 48 L.Ed.2d 578 (1976).
[9] *State of Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976).

1972, Congress recognized that water quality conditions varied greatly from place to place, and that the rate and level of cleanup might therefore vary from state to state. Accordingly, Congress established certain minimum standards and authorized the states to promulgate stricter standards. At the same time, Congress directed that federal agencies be subject to these stricter state standards, unless expressly exempted by the President of the United States.

SUBSTANTIALITY OF THE ISSUE PRESENTED

A. The Dredging Activities of the United States Army Corps of Engineers Present a Real and Present Danger to the Citizens of the Several States.

The threat of pollution from the dredging activities of the Corps of Engineers will endanger the health and welfare of the citizens of the numerous states in which the dredging is conducted. The pollution has already seriously lowered the water quality in Minnesota and has adversely affected the natural environment of its rivers and lakes.

B. A Review by This Court at This Time Would Settle a Substantial Controversy and Prevent Repetitious Litigation.

The issue in the instant appeal will arise repeatedly because the Federal Water Pollution Control Act (FWPCA) Amendments allow the individual states to establish effluent limitations and water quality standards for navigable waters within their jurisdictions. It is possible that all fifty states may adopt limitations and standards and then seek compliance by federal agencies, including the Corps of Engineers. Briefs by *amici* in the instant case indicate the extent of the controversy.

C. The Issue of Whether Federal Agencies, Including the United States Army Corps of Engineers, Must Comply With State Substantive Limitations and Standards Under the Federal Water Pollution Control Act is One of First Impression Before This Court.

In *Hancock v. Train,* the EPA conceded that federal agencies must comply with state substantive requirements under the Clean Air Act: "The parties *rightly* agree that §118 obligates federal installations to conform to state air pollution standards or limitations and compliance schedules."[10] As shown above, the EPA made the same concession for state effluent limitations and water quality standards under the Federal Water Pollution Control Act in *EPA v. California.*[11] Thus, this Court has not decided the important issue presented in the instant appeal. Moreover, because the Eighth Circuit reached its decision without reopening briefing or oral argument after this Court's decisions in *Hancock v. Train* and *EPA v. California,* the application of those leading decisions to the issue presented in the instant appeal has never been argued before any federal court.

[10]96 S. Ct. at 2013, 48 L.Ed.2d at 566 (emphasis added).
[11]96 S. Ct. at 2027, 48 L.Ed.2d at 588.

D. Consideration of This Case by This Court at the Present Time Will Advance the Partnership Being Forged Between the State and Federal Governments in Restoring the Quality of Our Waters and Thereby Enhancing the Health and Well-being of Our Citizens.

Effective implementation of the congressional policy underlying the Amendments to the Federal Water Pollution Control Act would be enhanced if this Court at this time declared the validity of the federal and state partnership to restore the quality of our waters.

ARGUMENT

THE DREDGING OPERATIONS OF APPELLEE WITHIN MINNESOTA ARE SUBJECT TO MINNESOTA'S SUBSTANTIVE EFFLUENT LIMITATIONS AND WATER QUALITY STANDARDS, WHICH WERE PROMULGATED PURSUANT TO THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972.

A. Congress Clearly Expressed its Policy and Established the Regulatory Authority of the States With Regard to Effluent Limitations and Water Quality Standards in the Federal Water Pollution Control Act Amendments of 1972.

Congress significantly strengthened the Federal Water Pollution Control Act by the 1972 Amendments.[12] The congressional declaration of policy expressly set forth in the 1972 Amendments established the environmental concerns of Congress and its desire that individual states have

[12]§§101 *et. seq.,* 33 U.S.C.A. §§1251 *et. seq.* (1976).

the primary right and responsibility to eliminate water pollution:[13]

> (a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—(1) *it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;*
>
> * * *
>
> (b) *It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution* . . . .

Section 313 of the Amendments declares in clear and unambiguous language that federal departments and agencies engaged in any activity which may cause the discharge of pollutants shall comply with state requirements related to the control and abatement of pollution to the same extent as any private person:[14]

> *Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government* (1) having jurisdiction over any property or facility, or (2) *engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements,* including the payment of reasonable service fees. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so . . . .

[13] §101(a) & (b), 33 U.S.C.A. §1251(a) & (b) (1976) (emphasis added).
[14] §313, 33 U.S.C.A. §1323 (1976) (emphasis added).

The term "pollutant," used within Section 313, is defined by the Amendments to include "dredged spoil," and other waste items.[15] This Court has held that the phrase "State requirements" of Section 313 does not include the optional permit programs authorized under the National Pollutant Discharge Elimination System (NPDES).[16] The Sierra Club and the League do not contest that portion of the Eighth Circuit's opinion dealing with permit programs. However, Congress meant by Section 313 that state substantive effluent limitations and other water quality standards shall govern federal activities and also the activities of private persons. The contrary holding by the Eighth Circuit in the instant case would render Section 313 meaningless. The Sierra Club and the League as *amici curiae* to this Court, submit that Congress meant what it said. Moreover, in *EPA v. California* this Court has already decided that state substantive requirements are binding upon all federal activities.

B. The Decision of the Eighth Circuit in *Minnesota v. Hoffman* Flies in the Face of This Court's Decision in *EPA v. California*.

In *EPA v. California,* this Court construed a portion of the Federal Water Pollution Control Act Amendments of 1972 and decided whether federal installations discharg-

[15] §502(6), 33 U.S.C.A. §1362(6) (1976).
[16] *EPA v. California,* 96 S. Ct. 2022, 48 L.Ed.2d 578 (1976).

ing water pollutants within a state must secure permits from that state or from the Environmental Protection Agency. A similar issue concerning the related Clean Air Act was decided at the same time in *Hancock v. Train.*[17] The Supreme Court held in both cases that a state permit system was not one of the "requirements" with which federal installations must comply.

Mr. Justice White, writing for the Court, analyzed the 1972 Amendments and explained that two major changes had been effected. First, the Amendments established maximum effluent limitations and acceptable water quality standards. Second, the Amendments created the National Pollutant Discharge Elimination System which established a permit system to be administered either by EPA or by the states. This Court held that Section 313—which requires all federal departments, agencies, and instrumentalities to comply with state requirements respecting control and abatement of pollution—did not comprehend the NPDES state permit programs.

In reaching his conclusion in *EPA v. California,* Mr. Justice White explained that Section 313 does not obligate federal departments and agencies to comply with state procedural requirements, as opposed to state substantive requirements. In fact, the EPA through Justice Department attorneys conceded that federal departments and agencies were bound by the state substantive requirements:[18]

[17]96 S. Ct. 2006, 48 L.Ed.2d 555 (1976).

[18]96 S. Ct. at 2027, 48 L.Ed.2d at 588 (emphasis added). Defendants' brief to the Eighth Circuit in the instant case also conceded that, at a minimum, federal agencies must comply with state effluent limitations and water quality standards: "[W]hether, as a general rule, Section 313 requires federal agencies to comply with State laws requiring discharge permits or only State effluent limitations and water quality standards is now before the United States Supreme Court in *EPA, et al v. People of California, ex rel. State Water Resources Board, et al, ... The argument of EPA in that case . . . is hereby adopted and incorporated herein.* Brief for the Appellants, at 21 (January 1976) (emphasis added). May the government now in good faith contest that all federal agencies and departments are in fact required to comply with state effluent limitations and water quality standards?

> *EPA's position is that the Amendments made clear "only that facilities of the executive, legislative and judicial branches operating within the states must comply with the applicable effluent limitations and compliance schedules promulgated by the particular state pursuant to its EPA—approved implementation plan,"* as incorporated in EPA—issued permits not that they comply with "state regulations demanding that sources of discharges—including federal facilities—obtain discharge permits."

Mr. Justice White quoted favorably from the Ninth Circuit's examination of legislative history of the 1972 Amendments to conclude that:[19]

> "[C]ertain parts of the legislative history would seem to indicate that the 'requirements' language of Section 303 refers simply and solely to substantive" standards, to effluent limitations and standards and schedules of compliance.

He noted that Section 510 of the Amendments permitted the states to set more restrictive standards, limitations, and requirements than those imposed upon the Amendments. The presence of stronger standards, reasoned Mr. Justice White, did not mean that state permits must be obtained by federal agencies, but did mean that federal permits must be utilized to enforce the *state* standards:[20]

[19]96 S. Ct. at 2029, 48 L.Ed.2d at 589.

[20]96 S. Ct. at 2031-32, 48 L.Ed.2d at 590-92 (emphasis added).

Section 510 quite plainly was intended to strengthen state authority. It may also have been intended to permit the States to impose stricter standards and effluent limitations on federal installations than would have been imposed under an EPA permit in the absence of an approved state NPDES program. But this hardly answers the question before us, which is whether these higher standards are to be enforced through a State rather than an EPA permit system.

* * *

We must also assume that Congress contemplated that there may be some States, which would elect not to develop an NPDES program but would nonetheless determine—as §510 permits—to adopt water quality standards or other limitations stricter than those EPA itself had promulgated and would otherwise apply. This being the case, Congress must have contemplated that EPA was capable of issuing permits in that State—to both federal and non-federal discharges—and of enforcing those stricter standards. . . .

> The presence of EPA as a permit-issuing authority means that although federal dischargers are not securing state NPDES permits they are nevertheless being subjected to the administrative authority of a federal agency *which is required to make a State's "more stringent limitation[s], including those necessary to meet water quality standards, treatment standards, or schedules of compliance" part of the conditions of the permits it must issue.*

In short, this Court held in *EPA v. California,* and the United States conceded, that State effluent limitations and water quality standards shall be enforced through federal permits for federal agencies and departments.

The contrary conclusion of the Eighth Circuit in *Minnesota v. Hoffman* that "there is insufficient evidence to meet the clear and unequivocable standard for finding Congressional authorization for state regulation . . ., whether by authorization under the NPDES *or independently thereof,*"[21] is contrary to both the express language of Section 313 and this Court's decision in *EPA v. California.*

C. The Decision of the United States Court of Appeals for the Eighth Circuit That Appellees Are Totally Immune From State Substantive Requirements Is Contrary to the Federal Water Control Pollution Act Amendments of 1972 and *EPA v. California.*

The instant case was submitted for decision before the Eighth Circuit on May 12, 1976. Approximately one month later this Court issued its two important decisions in *EPA v California* and *Hancock v. Train.* Unfortunately, despite the important contributions of this Court's guidance in those two cases, the Eighth Circuit did not reopen the instant case for additional briefings or arguments. Instead, on October 28, 1976, the Eighth Circuit decided both the procedural (permit) and substantive (effluent limitations and water quality standards) requirements questions adversely to the State of Minnesota. The Sierra Club and the League submit that the Eighth Circuit would have been assisted in its interpretation of *EPA v. California* if the instant case had been reopened for additional briefing.

For example the Eighth Circuit chose to rely upon Section 404 of the amendments,[22] which concerns only a per-

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[21] 543 F.2d 1198, 1209 (8th Cir. 1976).
[22] §404, 33 U.S.C.A. §1344 (1976).

mit program for the Corps of Engineers and not substantive standards, to support its conclusion that the Corps is not required to follow state effluent limitations and water quality standards. Section 404, while allowing the Corps of Engineers to assist in promulgating standards with regard to proposed discharges of dredged or filled material, was not enacted to enable the Corps to become a fiefdom unto itself. The Corps' standards promulgated pursuant to Section 404 must be reviewed by the administrator of the Environmental Protective Agency to determine that they are in accordance with EPA environmental standards.[23] The EPA, in turn, must take into consideration state effluent limitations and water quality standards in its review of the Corps' proposed standards.[24] Adequate briefing of that issue after *EPA v. California* would have shown the Eighth Circuit the important distinction between substantive and procedural standards.

[23] §404(b), 33 U.S.C.A. §1344(b) (1976).
[24] *Id.*

CONCLUSION

The Eighth Circuit Court of Appeals has erroneously construed the 1972 Amendments to the Federal Water Pollution Control Act and has failed to apply the law set forth in *EPA v. California*. The resulting decision in *Minnesota v. Hoffman* is of immense concern to environmental groups such as the Sierra Club and the Izaak Walton League. We respectfully request that this Court hear the appeal of the State of Minnesota and reverse the court below.

Respectfully submitted,

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